NO. 48751-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOHN BARAN,

Appellant.

BRIEF OF APPELLANT

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Assignment of Error

1. The trial court denied the defendant a fair trial when it allowed the state over defense objection to elicit propensity evidence under ER404(b) that was more prejudicial than probative.

2. The trial court denied the defendant his right to present a defense and his right to testify on his own behalf when it dictated his responses to questions the prosecutor indicated he would and did ask on cross-examination.

3. Trial counsel's failure to endorse a diminished capacity defense and to seek a court-appointed expert to support that defense denied the defendant effective assistance of counsel.

4. This court should not impose costs on appeal if the state substantially prevails.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant a fair trial if it allows the state over defense objection to elicit propensity evidence under ER404(b) that the defendant has a conviction for a similar crime when the admission of that evidence is more prejudicial than probative?

2. Does a trial court deny a defendant the right to present a defense and the right to testify if it dictates the defendant's responses to questions the prosecutor indicates he or she will and does ask on cross-examination?

3. Does a trial counsel's failure to endorse a diminished capacity defense and to seek a court-appointed expert to support that defense deny the a defendant effective assistance of counsel when compelling evidence supports that defense?

4. Should an appellate court impose costs on appeal if an indigent client has no present or future ability to pay those costs?

STATEMENT OF THE CASE

Factual History

In May of 2015, the defendant John Baran, his friend Conny Elliott, and their roommate Thomas Peck were sharing a house on NE 51st Avenue in Vancouver Washington. RP 32-33. The defendant and Mr. Peck were both engineering students at Clark College with the defendant acting as Mr. Peck's mentor at school. RP 33. They had know each other for about a year and Mr. Peck had roomed with the defendant and Mr. Elliott for about six months. RP 193-198. Up to that date there had only been the occasional dispute about food. RP 33.

On the evening of May 2nd that year the defendant came home intoxicated and got into a bit of an argument with Mr. Peck, who chided the defendant for driving after drinking instead of calling Mr. Peck to come and get him. RP 34-35, 44. After this exchange Mr. Peck went over to his girlfriend's house and the defendant went out and met with Mr. Elliott. RP 45. Mr. Peck was the first of the three to return to their shared home. RP 45-46. At about two or three that next morning the defendant and Mr. Elliott returned. RP 46-47. At the time the defendant was very intoxicated and both he and Mr. Elliott told Mr. Peck that they had drank nearly a liter of whisky. RP 48-49. According to Mr. Peck, the defendant was intoxicated to the point that he couldn't walk straight or speak coherently. RP 35-37. Once they got

home Mr. Elliott was able to get the defendant into his bedroom and into his bed. RP 36.

After Mr. Elliott got the defendant into his bed, both he and Mr. Peck sat down to watch some television. RP 36. However, after a few minutes they heard the defendant "stomping" down the hall, yelling incoherently and saying something about being "able to hear them." RP 37. According to Mr. Peck, the defendant was acting "really crazy" and was "not himself." *Id.* In fact, Mr. Peck later stated that "I have never seen him like that before." *Id.* At this point an argument ensued with Mr. Peck eventually saying that he was going to call the police and the defendant responding by calling Mr. Peck a "snitch." RP 37-38. At this point Mr. Peck went outside and called the police, reporting that his roommate was very drunk and abusive. *Id.*

Within a few minutes Mr. Peck returned to the house, stood in the doorway and told the defendant and Mr. Elliott that he had called the police. RP 37-38. According to Mr. Peck, the defendant responded by charging at the doorway and hitting the door, which then slammed and hit Mr. Peck on the shoulder. RP 38-39. Mr. Peck then waited outside and down the street a little. *Id.* Eventually Vancouver Police Officers Bibens, Price and Donaldson responded to the defendant's house. RP 66-68, 113-114, 148-150. When the officers approached they didn't see Mr. Peck, but they did see that the front door was partially open. RP 70. They could hear the defendant

inside yelling and Mr. Elliott trying to calm the defendant down. *Id.*

After hearing the defendant the officers walked up to the front door and went inside to find Mr. Elliott standing over the defendant and trying to calm him down as the defendant was seated on the couch. RP 70-71. Upon seeing the officers the defendant began to yell obscenities at them and ordered them out of the house. RP 70. Officer Bibens was the first to approach the defendant while Officer Donaldson contacted Mr. Elliott and ordered him to get out of the way and sit down. RP 72-74, 155. As Mr. Elliott stepped aside the defendant attempted to stand up. RP 72-74. As he did Officer Bibens put his hand on the defendant's shoulder and told him to sit back down. *Id.*

According to Officer Bibens, once he put his hand on the defendant's shoulder the defendant responded by grabbing the officer's arm pulling him on to the defendant who ended up in a half reclining position on the couch. RP 72-74. Officer Bibens then tried to get his arm around the defendant's neck to put him in a "sleeper hold." *Id.* However, Officer Bibens was unsuccessful in his attempt as the defendant is a very large man and although intoxicated was much more agile than the officer anticipated. RP 76-77. At this point Officer Price joined the affray. RP 76-77, 96-98. According to Officer Price the defendant responded by kicking out and catching Officer Price squarely in his groin, which caused the officer a great deal of pain. RP

121. The officers then struck the defendant at least three times in the head with their elbows and Officer Price struck the defendant at least one time in the head with his knee. RP 78, 123-125.

After the last blow the defendant gave up any physical struggle and submitted to being handcuffed. RP 78. However, the defendant did remain verbally abusive until medical aid arrived, entered the house and took him to the hospital for evaluation of the wounds the officers had inflicted upon him. RP 83, 125. Once the defendant was treated at the hospital and released one of the officers took him to jail. RP 161-164.

The defendant and Mr. Elliott's version of what happened varied from that of the officers in a couple of particulars. RP 193-121, 222-240. According to them the officers were upset when they entered the house and two of the officers responded to the defendant's verbal abuse by grabbing and beating him. RP 206-210, 233-236. Both the defendant and Mr. Elliott denied that the defendant had intentionally struck either officer. *Id.* The defendant also stated that he is extremely fearful of the police. RP 240. Ms. Peggy McCarthy, Executive Director of the Southwest Washington National Alliance on Mental Illness later gave the following assessment of the defendant:

> Mr. Baran lives with severe autism spectrum disorder (ASD), most probably with Aspergers. He is brilliant, especially with numbers and language. With the diagnosis of ASD comes severe

> anxiety, especially in social/group situations and depression along with probably numerous other disorders that often accompany ASD. He also lives with a severe case of PTSD that developed through a childhood of severe trauma. If his adverse childhood experiences (ACDs) were measured, he would have an astronomical score based only on what I know of his life before the age of 18. A score of five is almost always a significant factor for the development of chronic medical conditions including mental health disorders.
>
> Mr. Baran was born to a drug addicted and alcoholic mother who died a few years ago. His father currently claims to be a recovering alcoholic. Mr. Baran has told me about how he rummaged through trash cans and bins as a preschooler looking for food, because his mother would not (could not) feed him. When Mr. Baran was 6 or so, he was placed in a group home. When he began to hallucinate, he was sent to the Oregon State Hospital where he lived until he was about 10 years old. He recalls being strapped down and sedated much of the time. He was then returned a t community group home. When he was 14 he went into a series of foster care homes, 34 to be exact. and entered public school for the first time. . . .

CP 78-79.

Procedural History

By information filed May 4, 2015, and later amended, the Clark County Prosecutor charged the defendant John L. Baran with two counts of third degree assault against Officers Bibens and Price, one count of fourth degree assault against Mr. Peck, and one count of resisting arrest. CP 1-2, 3-4. The case later went to trial before a jury with the state calling the three Vancouver officers as well as Mr. Peck. RP 32-192. The defense then called Mr. Elliott and the defendant. RP 193-240. All of these witnesses testified to the facts contained in the preceding factual history. *See* Factual History,

supra.

In addition, at the beginning of trial the state successfully moved that the defense be precluded from eliciting the fact that the defendant suffers from Autism or any other mental disorder because the defense had not endorsed an expert witness who could either explain the disorder or testify to its relevance in this case. RP 11-13. The court granted the motion. *Id.* In fact, while the defendant's court-appointed attorney had sought and obtained court approval on four occasions for payment of investigative services, the defendant apparently never did ask the court for approval to hire a mental health or alcohol expert to render an opinion whether or not the defendant's combined extreme alcohol intoxication and severe autism affected his ability at the time of the event to form the intent to assault either the officers or Mr. Peck. CP 122-141.

At the end of the state's cross-examination of the defendant the following exchange took place.

> Q. Okay. And is it true you told Mr. Peck that night – you called him a "fucking snitch"?
>
> A. I did call him a snitch. He's – you know, he didn't call the police yet. But I told him if he calls the police, he's a freaking snitch. I'm afraid of the cops.
>
> All the cops do is – all I've known from childhood, you know, they take me away from my parents. They've – you know, they put me in a mental institution. They – you know, all I know police do is hurt me.

RP 240.

The state responded to the defendant's statement by moving that the court allow the state to elicit evidence that the year previous the defendant had been convicted of assaulting a probation officer. The state's request was as follows:

> MR. VAUGHN: So, Your Honor, the Court has ruled previously in limine that the State is not allowed to inquire about previous convictions of the defendant. The defendant has now testified that he's afraid of the police, that the police have only mistreated him, when, in fact, he's got an assault on a police officer conviction from just a year before this incident. So the State should be allowed to inquire into the facts of that, based on the answers defendant is giving –
>
> THE COURT: And where is that conviction from?
>
> MR. VAUGHN: – on the witness stand. It's in Clark County.
>
> MR. SCHILE: I think that was a corrections officer, actually.
>
> MR. VAUGHN: Yes.

RP 240-241.

The trial court granted the state's request over defense objection. RP 245-246. The court then held the following colloquy with the defendant.

> THE COURT: Well, I am going to allow the State to get in that he has been convicted of an assault in the fourth degree against a community corrections officer, and it's going to be limited to that.
>
> So, Mr. Baran, if you want to contest that, here's the documents that show that happened. And if you argue about it in front of the jury, it's only going to get worse.

THE WITNESS: Yes, ma'am.

THE COURT: So when Mr. Vaughn asks you, what are you going to say if you've been convicted of an assault in the fourth degree?

THE WITNESS: I have, ma'am.

THE COURT: I'm sorry?

THE WITNESS: I have, ma'am.

THE COURT: And that was against a community corrections officer?

THE WITNESS: Not mine.

THE COURT: I said a community corrections officer.

THE WITNESS: Yes, a community corrections officer.

RP 245-246.

After this colloquy the jury returned to the courtroom to hear the following as the last question and answer during the state's cross-examination of the defendant.

Q (By Mr. Vaughn) And, sir, were you previously convicted of assaulting a community corrections officer in 2014?

A. Yes.

RP 249.

Following extremely brief rebuttal testimony the court instructed the jury without objection from either party. RP 250-251, 253-264. The parties then presented their closing arguments with the jury retiring for deliberation

thereafter. RP 264-293, The jury later returned verdicts of guilty on all counts. RP 300-304; CP 51-54. Following sentencing within the standard range the defendant filed timely notice of appeal. CP 98-109, 110-118.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ALLOWED THE STATE OVER DEFENSE OBJECTION TO ELICIT PROPENSITY EVIDENCE UNDER ER404(b) WHICH WAS MORE PREJUDICIAL THAN PROBATIVE.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value. This rule states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative

value, a court should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987). In Graham's treatise on the equivalent federal rule, it states that the court should consider:

> the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

In addition, it is fundamental under our adversarial system of criminal justice that "propensity" evidence, usually offered in the form of prior

convictions or prior bad acts, is not admissible to prove the commission of a new offense. *See* 5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383 (3d ed. 1989). This common law rule has been codified in ER 404(b) wherein it states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Tegland puts this principle as follows:

> Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a "criminal type," and is thus likely to have committed the crime for which he or she is presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts that are merely unpopular or disgraceful.
>
> Arrests of mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are irrelevant and highly prejudicial.
>
> . . .
>
> The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed. 1989).

For example, in *State v. Pogue*, 108 Wn.2d 981, 17 P.3d 1272 (2001), the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the

defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court's permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "it's true that you have had cocaine in your possession in the past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The court stated:

> The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

State v. Pogue, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed and remanded the case for a new trial.

In addition, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), the defendant was charged with first degree robbery, second degree theft, taking a motor vehicle and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction Acosta appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals first addressed the issue of the

relevance of the criminal history. The court then held:

> Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

State v. Acosta, 123 Wn.App. at 426 (footnote omitted).

To admit evidence under an exception to ER 404(b), the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify on the record the purposes for which it admits the evidence, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Pirtle*, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995).

The decision in *State v. Escalona*, 49 Wn.App. 251, 742 P.2d 190 (1987), also explains why evidence of similar crimes denies a defendant the right to a fair trial. In *Escalona*, the defendant was charged with Second Degree Assault while armed with a deadly weapon, in that he allegedly threatened another person with a knife. In fact, Defendant had a prior conviction for this very crime, and prior to trial the court had granted a

defense motion to exclude any mention of this conviction. During cross-examination, defense counsel asked the complaining witness about a prior incident in which four people (not including the defendant) had assaulted him, and whether or not he was nervous on the day of the incident then before the court. The complaining witness responded: "This is not the problem. Alberto [the defendant] already has a record and had stabbed someone." *State v. Escalona*, 49 Wn.App. at 253. After this comment, defense counsel moved for a limiting instruction, which the court gave, and then moved for a mistrial, which was denied. Following conviction, defendant appealed, arguing that the court abused its discretion in refusing to grant his motion for mistrial.

In addressing this issue, the court recognized the following standard:

> In looking at a trial irregularity to determine whether it may have influenced the jury, the court [in *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)], considered, without setting for a specific test, (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow.

State v. Escalona, 49 Wn.App. at 254.

In analyzing the defendant's claim under this standard, the court first found that the error was "extremely serious" in light of the fact that it was inadmissible under either ER 404(b) or ER 609, and particularly in light of the "paucity of credible evidence against [the defendant]" and the

inconsistencies in the complaining witness's allegations, which almost constituted the state's entire case. Similarly, the court had no problem under the second *Weber* criterion finding that the statement was not cumulative of other properly admitted evidence, since the trial court had specifically prohibited its use.

As concerned the last criterion, the court stated:

> There is no question that the evidence of Escalona's prior conviction for having "stabbed someone" was "inherently prejudicial." *See State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The information imparted by the statement was also of a nature likely to "impress itself upon the minds of the jurors" since Escalona's prior conduct, although not "legally relevant," appears to be "logically relevant." *See State v. Holmes*, 43 Wn.App. 397, 399-400, 717 P.2d 766, *review denied*, 106 Wn.2d 1003 (1986). As such, despite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact. Furthermore, the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past. *See Saltarelli*, 98 Wn.2d at 362.
>
> While we recognize that in the determination of whether a mistrial should have been granted, "[e]ach case must rest upon its own facts," *[State v.] Morsette*, [7 Wn.App. 783, 789, 502 P.2d 1234 (1972) (quoting *State v. Albutt*, 99 Wash. 253, 259, 169 P.2d 584 (1917)), the seriousness of the irregularity here, combined with the weakness of the State's case and the logical relevance of the statement, leads to the conclusion that the court's instruction could not cure the prejudicial effect of [the alleged victim's] statement. Accordingly, under the factors outlined in *Weber*, we hold that the trial court abused its discretion in denying Escalona's motion for mistrial.

State v. Escalona, 49 Wn.App. at 255-56.

The decisions in *Pogue*, *Acosta* and *Escalona* each explain the unfair prejudice that arises in the minds of the jury when the state is allowed to elicit evidence that the defendant previously committed a crime, particularly one similar to the crime charged. The admission of this evidence is such a strong inducement to the jury to simply find the defendant guilty based upon his propensity to criminal conduct that its admission denies the defendant a fair trial.

In the case at bar, the trial court erred when it admitted evidence that the year previous the defendant had been convicted of a similar crime of assault against a probation officer the year previous. Ostensibly the court allowed this evidence in response to the defendant's testimony that he was afraid of the police and that they had always harmed him. The defendant's statement, made on cross-examination, was as follows:

> Q. Okay. And is it true you told Mr. Peck that night – you called him a "fucking snitch"?
>
> A. I did call him a snitch. He's – you know, he didn't call the police yet. But I told him if he calls the police, he's a freaking snitch. I'm afraid of the cops.
>
> All the cops do is – all I've known from childhood, you know, they take me away from my parents. They've – you know, they put me in a mental institution. They – you know, all I know police do is hurt me.

RP 240.

After this answer the state moved the court for permission to cross-

examine the defendant about his 2014 misdemeanor conviction for assaulting a correction's officer. The state's argument went as follows:

> MR. VAUGHN: So, Your Honor, the Court has ruled previously in limine that the State is not allowed to inquire about previous convictions of the defendant. The defendant has now testified that he's afraid of the police, that the police have only mistreated him, when, in fact, he's got an assault on a police officer conviction from just a year before this incident. So the State should be allowed to inquire into the facts of that, based on the answers defendant is giving –
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> THE COURT: And where is that conviction from?
>
> MR. VAUGHN: – on the witness stand. It's in Clark County.
>
> MR. SCHILE: I think that was a corrections officer, actually.
>
> MR. VAUGHN: Yes.

RP 240-241.

The trial court granted the state's request and the following was the last question and answer the jury heard on the state's cross-examination of the defendant.

> Q (By Mr. Vaughn) And, sir, were you previously convicted of assaulting a community corrections officer in 2014?
>
> A. Yes.

RP 249.

In this case the trial court twice erred when it granted the state's request to elicit the fact of the defendant's prior conviction. The first error was in the court's decision that the defendant's statement that he was afraid

of the police and that the police had previously abused him was somehow rebutted by the admission of the defendant's prior fourth degree assault conviction. In making this argument it should be noted that the defendant's prior conviction was not for third degree assault of a law enforcement officer in the performance of his or her duties. Although it may have been originally charged as such, the conviction was for fourth degree assault of an individual who happened to be a probation officer and apparently not even the defendant's probation officer. This evidence does not rebut the defendant's statements that he was afraid of the police and had previously been abused by them.

The second error that the court made was in its failure to perform any balancing between the relevance of the evidence compared to its unfair prejudice. As the decisions in *Pogue*, *Acosta* and *Escalona* explain, this unfair prejudice is at its maximum when the prior conviction is similar or the same as the current charge. In this case the way the state characterized the prior conviction ("previously convicted of assaulting a community corrections officer in 2014") made the prior conviction appear to be identical to the current charges of third degree assault. Given the identical nature of prior conviction, the unfair prejudice in this case far outweighed any slight relevance. As a result the trial court erred when it allowed the state to elicit this evidence over the defendant's objection.

The error in admitting this unfairly prejudicial evidence was far from harmless. In this case it was undisputed that the defendant was highly intoxicated and that had did not attempt to strike any blows with his arms or fists against the officers. In fact, the assault against the first officer involved the defendant grabbing the officer's arm and pulling him down on the couch on top of the defendant. While the state cast this as an intentional, offensive touching, there is a reasonably alternative explanation. That explanation is that as the defendant attempted to stand and the officer pushed him back down the defendant reached out instinctively and grabbed the officers arm to keep from falling. In other words, there is a reasonable alternative explanation that the defendant did not ever intentionally touch the first officer.

Similarly, while the officers in essence claimed that the defendant intentionally kicked the second officer, this event also lends itself to another explanation. That explanation is that the defendant was simply attempting to physically resist the first officer and while flailing out with his legs unintentionally kicked the second officer. These alternative and reasonable explanations for the defendant's conduct demonstrate that the evidence in this case was far from overwhelming. Thus, the admission of the defendant's prior conviction was far from harmless. As a result, this court should reverse the defendant's convictions for third degree assault.

II. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO PRESENT A DEFENSE AND HIS RIGHT TO TESTIFY ON HIS OWN BEHALF WHEN IT DICTATED HIS RESPONSES TO QUESTIONS THE PROSECUTOR INDICATED HE WOULD AND DID ASK ON CROSS-EXAMINATION.

As was stated in the previous argument, while due process does not guarantee every person a perfect trial, both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment do guarantee all defendants a fair trial. *State v. Swenson, supra; Bruton v. United States, supra.* As part of this right to a fair trial, a defendant charged with a crime has the right to present relevant, exculpatory evidence in his or her defense, including evidence of another perpetrator. *State v. Kwan*, 174 Wash. 528, 25 P.2d 104 (1933); *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

For example, in *Chambers v. Mississippi, supra*, the defendant was charged with murder. At trial, the defense did not dispute that the decedent had died of homicidal violence. Rather, the defense attempted to elicit evidence that another person had committed the offense. Specifically, the defense called the other person, and asked if he had committed the offense. When that person denied the allegation, the defense sought to impeach him with his prior statements admitting the murder. However, the trial court refused to allow the impeachment, holding that under the "voucher" rule a

party may not impeach his or her own witness.

The defense then attempted to call the three witnesses to whom the other person had confessed committing the murder. However, the trial court refused to allow this evidence, ruling that it was inadmissible hearsay. The defendant was convicted. He then appealed, arguing that the trial court's refusal to allow him to present evidence that another person committed the offense denied him a fair trial.

The Mississippi Supreme Court later affirmed the conviction, and the defendant obtained review before the United States Supreme Court. The Supreme Court reversed, holding that the trial court's exclusion of the defendant's evidence indicating that another person committed the offense denied him his right under the due process clause to a fair trial. The court stated:

> Few rights are more fundamental than that of an accused to present witnesses in his own defense. In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long existed. The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to

defeat the ends of justice.

Chambers v. Mississippi, 410 U.S. at 302 (citations omitted).

Another one of these fundamental rights of due process is the right to testify on one's own behalf. *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987); *State v. Robinson*, 138 Wn.2d 753, 982 P.2d 590 (1999). This right to testify is fundamental and as such the decision whether or not to testify lies solely with the defendant; it cannot be abrogated by either defense counsel or the court. *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996). As the following analysis of *State v. Robinson, supra* explains, the remedy available to the defendant who is denied the right to testify depends on how the deprivation occurs.

In *Robinson* a defendant convicted of second degree rape and unlawful imprisonment following a jury trial appealed the trial court's refusal to grant a motion for a new trial in which the defendant alleged that after the close of the defendant's case he informed his attorney that he wanted to testify on his own behalf but counsel ignored his demand, did not move to reopen his case-in-chief and simply proceeded with closing arguments. On appeal the defendant argued that trial counsel's failure to move to reopen to allow him to testify denied the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. He further argued that under the second

prong of the *Strickland* standard prejudice should be presumed since trial counsel's failure denied him the fundamental right to testify on his own behalf.

In addressing these arguments the court first noted that the defendant had presented significant evidence that he had indeed demanded that counsel move to reopen the defense case in order to allow him to take the stand. Since the trial court had not resolved this factual issue, the appellate court ruled that the defendant was entitled to an evidentiary hearing to resolve his factual claims. However, the court rejected the defendant's argument that prejudice should be presumed. Rather, the court held that a defendant claiming ineffective assistance of counsel based upon his trial attorney's actions preventing the defendant from testifying still had the burden of proving prejudice under *Strickland*. The court stated the following on this issue:

> We agree with these jurisdictions, and similarly decline to adopt a *per se* reversal rule. In order to prevail on his ineffective assistance of counsel claim, Robinson will therefore have to satisfy the *Strickland* test by proving that Kimberly's conduct was deficient (i.e., Robinson was actually prevented from testifying) and that his testimony would have a "reasonable probability" of affecting a different outcome. If Robinson meets this burden, he will be entitled to a new trial.

State v. Robinson, 138 Wn.2d 769-770 (citations omitted).

Although the decision in *Robinson* is clear about the standard of

review and the burden of proof under a claim of ineffective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, the court did not specifically address what standard applied when it was the court that prevented the defendant from testifying. However in *Robinson* the court did take pains to distinguish prior cases in which a defendant was granted a new trial based upon proof that he was denied the right to testify by pointing out that the deprivation in those cases came at the hands of the court, not counsel. In his partial dissent in *Robinson*, Judge Alexander noted the following on this issue:

> Indeed, we have concluded in *State v. Hill*, 83 Wn.2d 558, 520 P.2d 618 (1974), that deprivation of a defendant's right to testify is *per se* prejudicial. The Court of Appeals has done likewise in *In re Detention of Haga*, 87 Wn.App. 937, 943 P.2d 395 (1997), *review denied*, 134 Wn.2d 1015, 958 P.2d 316 (1998).
>
> The majority attempts to distinguish the aforementioned cases by pointing out that the abridgment of the right to testify there was by the trial court and not counsel. While the majority is correct in observing that in Hill we held that the trial court's evidentiary ruling interfered with the defendant's right to testify, it was clear that we held that the defendant does not have to show that he or she suffered prejudice in order to obtain a new trial.
>
> . . .
>
> . . . I fail to understand why counsel's interference with the same fundamental right should be held to a different standard. Contrary to the majority's efforts to confine *Hill* to its facts, we stated broadly there that the constitutional right to testify "should be unfettered and unhindered by any form of compulsion." *Hill*, 83 Wn.2d at 564, 520 P.2d 618. We did not add, as the majority would have us do, the words "by a trial judge" to the end of that sentence.

State v. Robinson, 138 Wn.2d at 771-772 (Alexander, J., concurring in part and dissenting in part).

The clear implication of the majority's efforts in distinguishing the decision in *Hill* and *Haga* as well as the dissent is that when the trial court denies a defendant the right to testify prejudice is presumed and the defendant is entitled to a new trial.

In the case at bar the defendant testified that he was afraid of police officers who continually hurt him. As was mentioned in the previous argument, his testimony at the end of cross-examination went as follows:

> Q. Okay. And is it true you told Mr. Peck that night – you called him a "fucking snitch"?
>
> A. I did call him a snitch. He's – you know, he didn't call the police yet. But I told him if he calls the police, he's a freaking snitch. I'm afraid of the cops.
>
> All the cops do is – all I've known from childhood, you know, they take me away from my parents. They've – you know, they put me in a mental institution. They – you know, all I know police do is hurt me.

RP 240.

After this answer the state obtained the court's permission to cross-examine the defendant about his 2014 misdemeanor conviction for assaulting a correction's officer. However, prior to allowing the state to proceed with its cross-examination, the court entered into the following colloquy with the defendant in which the court forbid the defendant from providing his version

of events surrounding his prior conviction. The colloquy went as follows:

> THE COURT: Well, I am going to allow the State to get in that he has been convicted of an assault in the fourth degree against a community corrections officer, and it's going to be limited to that.
>
> So, Mr. Baran, if you want to contest that, here's the documents that show that happened. And if you argue about it in front of the jury, it's only going to get worse.
>
> THE WITNESS: Yes, ma'am.
>
> THE COURT: So when Mr. Vaughn asks you, what are you going to say if you've been convicted of an assault in the fourth degree?
>
> THE WITNESS: I have, ma'am.
>
> THE COURT: I'm sorry?
>
> THE WITNESS: I have, ma'am.
>
> THE COURT: And that was against a community corrections officer?
>
> THE WITNESS: Not mine.
>
> THE COURT: I said a community corrections officer.
>
> THE WITNESS: Yes, a community corrections officer.

RP 245-246.

As the colloquy reveals, the defendant wanted to tell the jury the specifics about his prior conviction, including the fact that he did not assault his own community corrections officer. The court apparently thought that this was not in the defendant's best interests and the court then went to the

extraordinary length of having the defendant practice answering the prosecutor's intended question in a manner the court thought best. As the court told the defendant just prior to telling him what he could and couldn't say, "if you argue about it in front of the jury, it's only going to get worse."

The substance of this colloquy had two parts. The first was to tell the defendant that he was prohibited from further testimony about how he felt about the police. The second was to tell the defendant that he was prohibited from telling his side of his prior conviction. While this advice on both of these points might well have been appropriate had defendant's counsel given it to him privately, it was improper for the court to impinge upon the defendant's right to present his case and his defense as he chose. By doing this the trial court denied the defendant his due process right to present his defense as he chose and it denied him his right to present relevant, admissible evidence as he thought appropriate. As was argued previously, this court should conclusively presume that these errors denied the defendant a fair trial. Consequently, this court should vacate the defendant's convictions and remand for a new trial.

III. TRIAL COUNSEL'S FAILURE TO ENDORSE A DIMINISHED CAPACITY DEFENSE AND TO SEEK A COURT-APPOINTED EXPERT TO SUPPORT THAT DEFENSE DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1. § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at

694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, petitioner claims ineffective assistance based upon trial counsel's failure to endorse a diminished capacity defense and seek court approval to employ a court-appointed expert to support that defense. The following addresses this argument.

In the state of Washington "diminished capacity" is a potential defense to any offense that has either specific intent or knowledge as an element, as is the related claim that alcohol intoxication prevented a defendant from forming that requisite mental state. *State v. Hansen*, 46 Wn.App. 292, 730 P.2d 706, 737 P.2d 670 (1987). In such cases the defense may present evidence of diminished capacity in support of an argument that the defendant did not have the capacity to form the specific intent necessary to commit the crime and the jury may consider that evidence in determining whether or not the defendant had the capacity and did form the requisite *mens rea*. *State v. Warden*, 133 Wn.2d 559, 947 P.2d 708 (1997). In order to present a defense of diminished capacity, a party must normally call an expert who can establish that a mental disorder, including intoxication, impaired the

defendant's ability to form the requisite mental state of the charged crime. *State v. Ferrick*, 81 Wn.2d 942, 506 P.2d 860 (1973). That testimony must "logically and reasonably connect the defendant's alleged mental condition with the asserted inability to form the required [mental state] to commit the crime charged." *State v. Ferrick*, 81 Wn.2d at 945.

In the case at bar the record is replete with evidence that the defendant was highly intoxicated at the time of the event, that he was acting in a highly unusual fashion, and that his mental faculties were impaired by alcohol. In addition, there was a great deal of evidence in the record that the defendant suffered from autism and other mental disorders that may have well prevented him from forming the intent required to commit the charged offenses. In fact, the state was sufficiently aware of the defendant's mental problems that it brought a successful motion *in limine* to exclude any such evidence based upon the defense's failure to obtain and endorse an expert.

Given this evidence, any reasonable defense attorney would approach the court for funds to employ an expert to perform an evaluation on the defendant and render an opinion on both the defendant's diminished capacity based upon his mental disorders as well as his inability to form the specific intent to commit the crimes based upon severe alcohol intoxication. There is no tactical reason for defense counsel's failure to take these actions. Although counsel in this case approached the court on four occasions seeking

and obtaining permission to employ an investigator, the defense did not file a single motion seeking permission to employ a mental or alcohol expert even in the face of compelling evidence that a defense of diminished capacity was available. Thus, counsel's failure to seek such an expert fell below the standard of a reasonable prudent attorney.

A fair review of the evidence presented at trial indicates that defense counsel's failure to seek and obtain an expert on diminished capacity does undermine confidence in the outcome of this case and thereby constitutes ineffective assistance of counsel. This evidence came from all four of the state's witnesses. Each one repeated the observation that the defendant was highly intoxicated. In addition, Mr. Peck's testimony was that the defendant was "acting really crazy," that he "was not himself" and that the witnesses had "never seen him like that before." This evidence calls out the likelihood that the defendant's severe intoxication interfered with his capacity to form the intent to commit an assault.

Finally, in this case both defense counsel and the prosecutor were aware that the defendant had a severe mental disorder. A subsequent letter to the court from Ms. Peggy McCarthy, Executive Director of the Southwest Washington National Alliance on Mental Illness, explained how extreme his mental disorders were. She stated:

Mr. Baran lives with severe autism spectrum disorder (ASD),

> most probably with Aspergers. He is brilliant, especially with numbers and language. With the diagnosis of ASD comes severe anxiety, especially in social/group situations and depression along with probably numerous other disorders that ofter accompany ASD. He also lives with a severe case of PTSD that developed through a childhood of severe trauma. If his adverse childhood experiences (ACDs) were measured, he would have an astronomical score based only on what I know of his life before the age of 18. A score of five is almost always a significant factor for the development of chronic medical conditions including mental health disorders.
>
> Mr Baran was born to a drug addicted and alcoholic mother who died a few years ago. His father currently claims to be a recovering alcoholic. Mr. Baran has told me about how he rummaged through trash cans and bins as a preschooler looking for food, because his mother would not (could not) feed him. When Mr. Baran was 6 or so, he was placed in a group home. When he began to hallucinate, he was ent to the Oregon State Hospital where he lived until he was about 10 years old. He recalls being strapped down and sedated much of the time. He was then returned to a community group home. When he was 14 he went into a series of foster care homes, 34 to be exact, and entered public school for the first time. . . .

CP 78-79.

This evidence undermines confidence in the jury's verdict. Consequently, counsel's failure to obtain an expert and endorse and argue a diminished capacity defense denied the defendant effective assistance of counsel.

IV. THIS COURT SHOULD NOT IMPOSE COSTS ON APPEAL.

The appellate courts of this state have discretion to refrain from awarding appellate costs even if the State substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000);

State v. Sinclair, 192 Wn. App. 380, 382, 367 P.3d 612, 613 (2016). A defendant's inability to pay appellate costs is an important consideration to take into account when deciding whether or not to impose costs on appeal. *State v. Sinclair, supra.* In the case at bar the trial court found Jesse Wilkins indigent and entitled to the appointment of counsel at both the trial and appellate level. CP 3, 165-166. In the same matter this Court should exercise its discretion and disallow trial and appellate costs should the State substantially prevail.

Under RAP 14.2 the State may request that the court order the defendant to pay appellate costs if the state substantially prevails. This rule states that a "commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." RAP 14.2. In *State v. Nolan, supra*, the Washington Supreme Court held that while this rule does not grant court clerks or commissioners the discretion to decline the imposition of appellate costs, it does grant this discretion to the appellate court itself. The Supreme Court noted:

> Once it is determined the State is the substantially prevailing party, RAP 14.2 affords the appellate court latitude in determining if costs should be allowed; use of the word "will" in the first sentence appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision.

State v. Nolan, 141 Wn. 2d at 626.

Likewise, in RCW 10.73.160 the Washington Legislature has also granted the appellate courts discretion to refrain from granting an award of appellate costs. Subsection one of this statute states: "[t]he court of appeals, supreme court, and superior courts ***may*** require an adult offender convicted of an offense to pay appellate costs." (emphasis added). In *State v. Sinclair*, *supra*, this Court recently affirmed that the statute provides the appellate court the authority to deny appellate costs in appropriate cases. *State v. Sinclair*, 192 Wn. App. at 388. A defendant should not be forced to seek a remission hearing in the trial court, as the availability of such a hearing "cannot displace the court's obligation to exercise discretion when properly requested to do so." *Supra.*

Moreover, the issue of costs should be decided at the appellate court level rather than remanding to the trial court to make an individualized finding regarding the defendant's ability to pay, as remand to the trial court not only "delegate[s] the issue of appellate costs away from the court that is assigned to exercise discretion, it would also potentially be expensive and time-consuming for courts and parties." *State v. Sinclair*, 192 Wn. App. at 388. Thus, "it is appropriate for [an appellate court] to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellate brief." *State v. Sinclair*, 192 Wn. App. at

390. In addition, under RAP 14.2, the Court may exercise its discretion in a decision terminating review. *Id.*

An appellate court should deny an award of costs to the state in a criminal case if the defendant is indigent and lacks the ability to pay. *Sinclair, supra.* The imposition of costs against indigent defendants raises problems that are well documented, such as increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *State v. Sinclair*, 192 Wn.App. at 391 (citing *State v. Blazina, supra*). As the court notes in *Sinclair*, "[i]t is entirely appropriate for an appellate court to be mindful of these concerns." *State v. Sinclair*, 192 Wn.App. at 391.

In *Sinclair*, the trial court entered an order authorizing the defendant to appeal *in forma pauperis*, to have appointment of counsel, and to have the preparation of the necessary record, all at State expense upon its findings that the defendant was "unable by reason of poverty to pay for any of the expenses of appellate review" and that the defendant "cannot contribute anything toward the costs of appellate review." *State v. Sinclair*, 192 Wn. App. at 392. Given the defendant's indigency, combined with his advanced age and lengthy prison sentence, there was no realistic possibility he would be able to pay appellate costs. Accordingly, the Court ordered that appellate costs not be awarded.

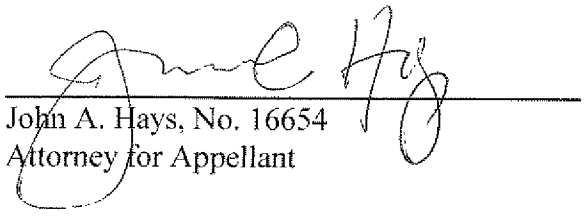
Similarly in the case at bar, the defendant is indigent and lacks an ability to pay. First, the trial court found the defendant indigent and unable to pay the costs of either the trial or the appeal. Second, the defendant's mental diagnoses and status as a convicted sex offender (prior conviction) indicates that he has no resources with which to support himself, nor will he. Given these factors, it is unrealistic to think that the defendant will be able to pay appellate costs. Thus, this court should exercise its discretion and order no costs on appeal should the state substantially prevail.

CONCLUSION

The defendant was denied a fair trial based upon the trial court's admission of unfairly prejudicial evidence of a prior similar conviction, and the trial court's colloquy that impinged upon the defendant's right to testify in his own behalf. In addition, defense counsel's failure to obtain an expert and endorse a diminished capacity defense denied the defendant effective assistance of counsel. As a result, this court should vacate the defendant's assault convictions and remand for a new trial. In the alternative, this court should not impose costs on appeal if the state substantially prevails.

DATED this 29th day of July, 2016.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

WASHINGTON CONSTITUTION
ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **JOHN BARAN,** **Appellant.**	**NO. 48751-9-II** **AFFIRMATION OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Tony Golik
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Dated this 29th day of July, 2016, at Longview, WA.

John A. Hays, No. 16654
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